APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMENIC DIIULIO, *et al.*,

Plaintiffs,

No. 78 C 2335 *vs.*

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, *et al.*,

Defendants.

Before the Honorable
Nicholas J. Bua, *Judge*
United States District Court

ORDER

The present action, brought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment of the United States Constitution, is founded upon acts of the defendants which, it is alleged, were violative of due process and equal protection. As damages, declaratory and injunctive relief all are being sought, jurisdiction over the matter properly lies under 28 U.S.C. § 1343(3).

The plaintiffs herein are patrolmen employed by the Board of Fire and Police Commissioners of the City of Northlake [the Board]. On December 10, 1977 the Board held a promotional examination for the rank of Ser-

geant. The plaintiffs, seeking promotion to that rank, unsuccessfully participated in said examination.[1]

The plaintiffs now contend, in their Third Amended Complaint, that this promotional examination was "arbitrary, capricious and discriminatory and lacked and was devoid and not in furtherance of any substantial, rational, reasonable and/or compelling relationship to any legitimate promotional scheme for the rank of Sergeant. . . ." They further allege that they have a proprietary interest in having promotional examinations of this nature be either validated or otherwise shown to be job-related, and that the examination at issue was neither validated nor adequately job-related. For these reasons, the plaintiffs argue, they have been deprived of due process and/or denied equal protection. Presently before the court is the defendants' motion for summary judgment. Rule 56(b), Fed. R. Civ. P.

In determining whether an individual has been deprived of rights guaranteed under the Fourteenth Amendment, the threshold question to be resolved is whether a constitutionally protected interest is involved in the claim being raised. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the United States Supreme Court indicated that, to resolve this question, a two part analysis is to be applied. The nature of the interest alleged to be at stake must first be examined; then the process due under the circumstances must be determined.

In the present matter, the plaintiffs have alleged that a property interest is at stake. That being so, as the creation of property interests is guided by state, not federal law, Illinois law must be examined. When so doing, however, it must be remembered that the Supreme Court has held that neither abstract need or desire nor unilateral expectations are protectable interests. *Board of Regents v. Roth, supra*; *Perry v. Sindermann*, 408 U.S.

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[1] The Board, its individual members, and those patrolmen who successfully completed the examination at issue all are named as defendants in this action.

593 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976). The state law to be applied, therefore, must set out a recognizable property interest or provide a legitimate basis for a claim of entitlement if a protected interest is to be found.

To support their claim of a proprietary interest in a validated or job-related promotional examination, the plaintiffs rely on the Illinois Municipal Code. Ill. Rev. Stat. ch. 24, § 10-2.1-1, *et seq.* Chapter 24, section 10-2.1-15 of the Illinois Revised Statutes regulates promotions. It provides as follows:

> The board, by its rules, shall provide for promotion in the fire and police departments on the basis of ascertained merit and seniority in service and examination and shall provide in all cases, where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to examination. . . . The method of examination and the rules governing examination for promotion shall be the same as provided for applicants for original appointment.

The method of examination for original appointment is found in Chapter 24, section 10-2.1-6 of the Illinois Revised Statutes, which provides:

> All applicants . . . shall be subject to an examination which shall be public, competitive, and free to all applicants unless the council or board of trustees by ordinance limit applicants to electors of the municipality, county, state, or nation and shall be subject to reasonable limitations as to residence, health, habits and moral character. . . . The examinations shall be practical in character and relate to those matters which will fairly test the capacity of the persons examined to discharge the duties of the positions to which they seek appointment. . . . The examination shall include tests of physical qualifications and health. . . . No applicant shall be examined concerning his political or religious opinions or

> affiliations. The examination shall be conducted by the board of fire and police commissioners of the municipality. . . .

Although the Illinois courts have not expressly decided whether a property interest is created by these provisions, a fair reading of them clearly reveals a statutory scheme which focuses upon obtaining meritorious individuals for appointment and promotion. These provisions establish the procedure the Board is to use to determine those who may be eligible for promotion, with the clear directive that those in the next lower rank who "desire to submit" to examination shall compete against others for the same position. The statutory term "competitive" connotes that such examination should be scored, with individual performances ranked to determine who was the most successful. The examination also is to be conducted by the Board, and must be competitive within the general areas specified.

No requirement that the promotional test be validated or job-related (the court understanding both terms to reflect certain specialized psychological and/or statistical procedures used to structure examinations), however, is provided in the Illinois statutes. Rather, all that is required is that the promotional examination be competitive, and that the Board follow the procedures specified to determine eligibility. The use of technical studies of the type referred to by the plaintiffs thus is neither required nor implied under Illinois law.

As the court's examination of Illinois law does not reveal the existence of a proprietary interest in a validated or otherwise certified job-related promotional examination, it is clear that no constitutionally protected interests are involved in the present matter. That being so, the plaintiffs cannot be properly heard to complain that they were deprived of due process.

The plaintiffs also seek relief on equal protection grounds. In so doing, however, they have not contended that the other individuals who submitted to the examination at issue were afforded any advantage which was

denied to them, nor do they allege improper administration, scoring or other misconduct on the part of the defendants. The plaintiffs also have not presented facts which would indicate that the examination under discussion was discriminatory, in that it had some adverse impact on racial minorities, females or ethnic group members. Thus, in examining the pleadings and affidavits before it, the court finds no evidence to show that, from a constitutional perspective, those who competed in said examination were not treated similarly. That being so, the plaintiffs' equal protection claim must fail.[2]

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[2] In their supporting memorandum requesting leave to file the Third Amended Complaint, the plaintiffs, citing to *Davis v. County of Los Angeles*, ... U.S. ....., 99 S.Ct. 1379 (1979); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Richardson v. Pennsylvania Department of Health*, 561 F.2d 289 (3d Cir. 1977); and *Pennsylvania v. Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970), contend that validation of promotional examinations has been required by the Supreme Court, the Seventh Circuit and various other courts. In each of the cases cited, however, the respective plaintiffs had alleged race or sex discrimination in the examination at issue, and had established that an adverse impact on the affected class had resulted from the use of said examination. Because an adverse impact had been shown, the burden of proof shifted to the defendants in those cases to prove that the examinations were not discriminatory.

The courts have used the EEOC guidelines found in 29 C.F.R. § 1607, *et seq.* to measure test validity when such was at issue. *Davis v. County of Los Angeles, supra; United States v. City of Chicago, supra.* Even these guidelines, however, do not require validation or job-relatedness studies in every instance where an examination is used as a selection device.

§ 1607.2(B) states that guidelines apply to any employment decision which includes promotions. Regarding compliance with said guidelines, however, § 1607.16 provides that "use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines or *if such use does not result in adverse impact on any race, sex, or ethnic group.*" (Emphasis added). Moreover, subpart C of § 1607.4—entitled the "bottom line"—reads:

(Footnote continued on following page)

Accordingly, the court having found that, as a matter of law, the plaintiffs' due process and equal protection claims both lack merit, the defendants' motion for summary judgment is granted in its entirety.[3]

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
United States District Judge

DATED: June 5, 1980

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[2] *continued*

> If this information [that is regarding employment opportunities of persons by race, sex or ethnic group] shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. . . .

[3] In this Order, the court has not addressed or ruled upon the quality of the examination at issue, nor has it considered whether said examination might be discriminatory on the basis of race, sex or ethnicity.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMENIC DIIULIO

No. 78 C 2335 *vs.*

BOARD OF FIRE & POLICE COMMISSIONERS
OF THE CITY OF NORTHLAKE, et al

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Nicholas J. Bua, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that plaintiff take nothing and action is dismissed on the merits.

Dated at Chicago, Illinois, this 5th day of June, 1980.

H. STUART CUNNINGHAM
Clerk of Court

By /s/ FRANCES D'ANDREA
Deputy Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1966

DOMENIC DIIULIO, *et al.*,

Plaintiffs-Appellants,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF NORTHLAKE, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-2335—Nicholas J. Bua, *Judge.*

SUBMITTED APRIL 26, 1982*—DECIDED JUNE 30, 1982

Before CUMMINGS, *Chief Judge*, PELL, *Circuit Judge*, and CUDAHY, *Circuit Judge.*

PELL, *Circuit Judge.* At issue in this case is the constitutional validity of an examination required for the

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a); Fed. R. App. P., Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

promotion of appellants, police patrolmen, to the position of police sergeant.[1]

I

In our appraisal of appellants' claims we must accept their version of the facts properly before the district court because that court granted summary judgment against them.[2] *Bishop v. Wood*, 426 U.S. 345, 347 (1976).

Appellants were hired prior to December 10, 1977, as police patrolmen by the Board of Fire and Police Commissioners of the City of Northlake, Illinois. Promotion within the Northlake Police Department is governed by state law and the Rules and Regulations of the Board of Fire and Police Commissioners of the City of Northlake (the Board), *Ill. Rev. Stat.* ch. 24, §10-2.1-1, *et seq.*, pursuant to which, promotions are based upon merit, seniority, and competitive examinations. In all cases where it is practicable, vacancies are to be filled by promotion. A promotion roster must be prepared based on the competitive examinations, ascertained merit, and seniority. Vacancies must be filled by one of the three candidates at the top of the roster, and a high ranking candidate cannot be passed over more than twice.

"[I]n determining next in order of rank in promotional examinations, . . . [the Board] extend[s] the examination successively through all the orders of rank in the services in an endeavor to qualify suitable eligible or eligibles for the vacancy or vacancies existing before extending the examination to the general public." And "[n]o examination shall be given if a vacancy exists at that time and an eligibility list is in existence." The

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[1] The action was brought pursuant to 42 U.S.C. § 1983 and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Damages, as well as declaratory and injunctive relief, are being sought.

[2] In granting summary judgment for appellees the district court was required to resolve all genuine disputes as to material facts in favor of appellants. *Fed. R. Civ. P.* 56(c).

names of candidates on the promotional roster may be removed by the Board after two years only if all existing vacancies are filled prior to cancellation. *Ill. Rev. Stat.* ch. 24, § 10-1-13.

The competitive written promotional exam accounts for 55% of the total score in the promotional scheme.[3] A score of 70 is required to pass the written exam. It is statutorily provided that the examination shall be conducted by the Board and that the "examinations shall be practical in character and relate to the matters which will fairly test the capacity of the persons examined to discharge the duties of the positions to which they seek [promotion]." *Ill. Rev. Stat.* ch. 24, § 10-2.1-6.

On December 10, 1977, the Board held a promotional examination for the rank of sergeant.[4] The plaintiffs, seeking promotion to that rank, unsuccessfully participated in said examination.[5]

Appellants' cause of action is based on their claim that the promotional examination was "arbitrary, capricious, and discriminatory and lacked and was devoid and not in furtherance of any substantial, rational, reasonable an [sic]/or compelling, relationship to any legitimate promotional scheme for the rank of sergeant, purpose or objective, in violation and derogation of due process of law and the equal protection of the laws guaranteed under the Fourteenth Amendment . . . because it was not validated nor job related."[6] This case is not

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[3] The other factors in the promotional scheme are ascertained merit and seniority in service.

[4] The Board stated that since 1970 it has used independent testing agencies to develop and conduct the written promotion examinations.

[5] Three plaintiffs did not achieve the minimum score necessary for placement on the promotion roster. One plaintiff passed the examination and was ranked seventh on the promotion roster.

[6] Appellants cite specific questions contained in the promotional exam which they argue are representative of the examination's alleged lack of job relatedness or validity: "a. Would

(Footnote continued on following page)

moot as we cannot state with assurance that there is no reasonable expectation that the alleged violation will recur, nor have interim relief or events completely and irrevocably eradicated the effects of the alleged violation. *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979).

II

To satisfy the prerequisite for an assertion of the constitutional requirements of due process, a party must implicate a protected interest in either life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569, 570, 571 (1972). The district court disposed of appellants' due process claim by concluding that since state law does not grant appellants "a proprietary interest in a validated or otherwise certified job-related promotional examination, it is clear that no constitutionally protected interests are involved in the present matter." We believe that the district court's sole focus on a property interest without regard to a liberty interest was in error. Appellants' promotion was not a matter subject to the Board's grace, nor was it a matter left to the unfettered discretion of the Board. *Compare, Board of Regents v. Roth*, 408 U.S. at 567. As we explained in Part I, the promotion scheme was based on evaluation of merit, seniority, and competitive examination. While the state can require high standards of qualifications, these

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[6] *continued*
you drink blood if you had to? b. Do you believe God has talked to you personally? c. When you wake up in the morning, is your heart beating? . . . The above questions represent approximately 450 similar questions that had to be answered either as never, most never, probably not, probably, most probably, more likely . . . none of the questions related to police work . . . . [Some of the other cited questions] def[y] a correct answer without requiring the examinee to explain his answer. . . . [Other cited] questions required a self-evaluation by the examinee which evaluation was self-opinionated and would have no bearing on his performance as a police officer. . . . [And] the last section of the written examination was not validated or job related in that it required knowledge of crimes that police officers do not ordinarily encounter [examples cited]."

standards must have a rational connection with the applicant's fitness or capacity to be a police sergeant. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). Attaching unreasonable and arbitrary requirements is violative of constitutional due process. *Smith v. Texas*, 233 U.S. 639 (1914); *Smith v. Alabama*, 124 U.S. 465, 480 (1888); *State v. Walker*, 48 Wash. 8 (1907).[7] In the instant case, at issue is not the state's right to require an examination, but the rational relation between the particular questions formulating the examination and the functions of the job of police sergeant. We hold that appellants have sufficiently implicated a liberty interest in promotion which cannot be denied without constitutional due process.[8]

While the state may test a person for the job, it may not test a person in the abstract. Constitutional due process guarantees that no person will be arbitrarily deprived by the government of his liberty to engage in any occupation. "[T]he liberty guaranteed by the Fourteenth Amendment . . . without doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life . . . ." *Meyer v. Nebraska*, 262 U.S. 390 (1923), *cited in Board of Regents v. Roth*, 408 U.S. at 572; *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *Traux v. Raich*, 239 U.S. 33, 41 (1915). In *Graves v. Minnesota*, 272 U.S. 425 (1926), the Supreme Court upheld the constitutionality of a state statute prohibiting the practice of dentistry without a diploma from a

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[7] Of course the Fourteenth Amendment applies only to government actions. It is conceded here that appellees have acted pursuant to authority conferred by state law. *See* Part I, *supra*. The limitation against arbitrary action restricts the power of a state "no matter by what organ it acts." *Missouri v. Dockery*, 191 U.S. 165 (1903).

[8] "If [a state] purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to the applicant's qualifications to practice [a profession], the statute would, of course, violate the due process clause of the Fourteenth Amendment." *Douglas v. Noble*, 261 U.S. at 168.

dental college of good standing, as against the contention that the requirement violated constitutional due process. The Court did not uphold the requirement of a diploma *per se*, but rather the rationale for requiring a particular type of diploma in that case. As the Court stated, "clearly the fact that an applicant for a license holds a diploma from a reputable dental college has a *direct and substantial relation to his qualification to practice dentistry.*" *Id.* at 428 (emphasis added).

Similarly, at issue in the instant case is whether the particular promotion examination has a direct and substantial relation to appellants' qualifications to be police sergeants.[9] In *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), (*Konigsberg II*) the Supreme Court upheld the state's refusal to license an applicant to the bar because of his refusal to answer questions. Again *Konigsberg II* did not sanction the asking of any questions regardless of their rational relation to the functions of the profession. What was critical in *Konigsberg II* was that the particular questions at issue were found to be substantially relevant to the applicant's qualification and thus in accordance with due process guarantees. Appellants' assertion in the instant case is analogous to the assertion of an applicant for admission to the State Bar whose prior membership in the Communist party and his use of aliases were not rationally related to the qualifications required for membership in the legal profession as to serve as a rational basis for the state to deny him permission to take the bar exam. *Schware v. Board of Bar Examiners, supra.* In *Schware* the Supreme Court held that plaintiff had sufficiently asserted

[9] "[I]t does a man little good to stay alive and free and propertied, if he cannot work [in his chosen occupation]. The distinction between the state's power to license doctors and to license street vendors is one of degree. The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law." *Barsky v. Board of Regents*, 347 U.S. 442, 473-74 (1954) (Douglas, J. *dissenting*).

a liberty interest to employment guaranteed by the due process clause.[10]

III

Normally in a case such as this, where only constitutional due process interests are sufficiently asserted, a plaintiff has the burden of moving forward and the ultimate burden of proving that the state-established requirements for the employment he sought are not rationally related to the functions of the job.[11] The state is

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[10] Appellants' claim is not precluded by the fact that they cannot be certain that they would have achieved a sufficient score so that they would have been promoted had they been given a job-related examination. In *Schware*, the plaintiff could not be certain that he would have in fact passed the bar examination; nevertheless he was allowed to challenge, on due process grounds, the state's denial to him, based on a finding of unfitness to practice law, of permission to take the examination.

The district court concluded that plaintiffs have no proprietary interest in a job-related promotion exam. However, because we hold that plaintiffs asserted a due process claim based on a liberty interest, and because the due process requirements of a rational relationship between the examination and the job functions of a sergeant are the same in this case, whether plaintiff is recognized to have a liberty or proprietary interest, it is unnecessary for us to determine if plaintiffs have a proprietary interest recognized under state law.

[11] Also compare the burden of proof in a case involving the constitutional standard for adjudicating claims of invidious racial discrimination, on the one hand, and Title VII discriminatory impact claims on the other hand: Under Title VII plaintiff establishes a prima facie case of racial discrimination by merely showing "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemark Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The burden then shifts to the defendant to show that the testing system has been validated for job relatedness through proof "by professionally acceptable method" that the testing system is "'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" *Id.* at

(Footnote continued on following page)

not constitutionally mandated to establish an examination as a requirement for promotion. Constitutional due process requires only that whatever requirements are established by the government must have a rational relation to the job's performance. Once the plaintiff puts into question the rationality of the requirements, the defendants may, but they are not constitutionally required to, articulate the rationality of the requirements by relying on the results of a professional validation study. There is no one method which is required for appropriately evaluating the relationship of an employment requirement to job performance.[12] *Washington v. Davis*, 426 U.S. at 247.

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[11] *continued*
431. The Title VII plaintiff may then attempt to show that the defendant's test validation was merely a pretext by proving "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Id.* at 425 (citation omitted).

On the other hand, "racial discrimination within the meaning of the equal protection clause could not be demonstrated solely by a racially disproportionate impact. Rather . . . for constitutional purposes it is necessary to show an intent or purpose to discriminate by reason of race. Thus, the Court has differentiated between the standard necessary to prove a violation of Title VII and the standard required under the Constitution. Under Title VII, a disproportionate racial impact remains enough to establish a prima facie case while under the Constitution evidence of intention must be proved." *United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977), *citing*, *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

[12] The inquiry as to the rational relationship of a promotion examination to job performance is not limited to equal protection claims based on adverse racial impact. The district court was incorrect to assume that the inquiry as to the validity of the promotion examination is limited to claims of adverse racial impact. The district court placed too heavy a reliance on EEOC "Guidelines" which provide that "use of a selection procedure is in compliance with these guidelines . . . *if such use does not result in adverse impact on any race, sex, or ethnic group*". 29 CFR § 1807.16, *cited* at note 2 of district court's order (emphasis added by the district court). The EEOC

(Footnote continued on following page)

The distinction elucidated between constitutional claims under the Fifth and Fourteenth Amendments and a Title VII claim, is crucial because, unlike under Title VII, the inquiry in the instant case, resting solely on alleged violation of constitutional due process, should not focus on the quality of a particular validation study, or on the availability of other employment selection procedures that would have a less discriminatory impact. *Id.* at 247-48. In the instant case, plaintiffs may not simply challenge the quality of the validation study without showing a lack of rational basis between the promotion requirements and a sergeant's job functions. In the due process context, there is no basis for courts to inquire as to whether or not a particular promotion method is most efficacious. And if defendants choose to articulate the rationale of the established procedures by depending on a validation study, it is not open to judicial inquiry whether a different validation study would have been superior. The judicial inquiry is over once a rational basis between the requirements and the job's functions is shown.

IV

While in the usual case the plaintiffs would have the burden of proving a lack of rational connection between the particular promotion examination and the functions of the job sought,[13] in the instant case defendants had

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[12] *continued*
guidelines focus on racial impact because they are the enforcing agency's administrative interpretation of Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), and Title VII is specifically geared to employment discrimination practices. As we explained, a professional validation study is merely a statutory requirement under Title VII, but it is not a constitutional requirement. However, an examination allegedly lacking in a rational relationship to the functions of the job to which it is geared is not foreclosed from constitutional due process inquiry for having the distinguishing characteristic of being nondiscriminatory in its alleged irrationality. Whether the rights implicated are based on due process, equal protection, or Title VII, merely affects the burdens of proof.

[13] We agree with the district court that plaintiffs did not sufficiently assert a claim of denial of equal protection.

the burden of proving that there was no genuine issue of material fact and that they were entitled to a judgment as a matter of law because defendants moved for a summary judgment. *Fed. R. Civ. P.* 56. The record discloses that the defendants articulated a rational relationship between the particular questions challenged in plaintiffs' complaint and the actual job functions of police sergeants.[14] In challenging the motion for summary judgment plaintiffs are not required to prove their contentions, but they are required to present enough specific facts as to raise a genuine issue as to the material issue of the rational relationship between the promotion examination questions and the job functions of police sergeants. *Choudhry v. Jenkins*, 559 F.2d 1085, 1089 (7th Cir. 1977). Thus it was up to the plaintiffs to raise an issue that the examination questions could not rationally gauge an examinee's ability to perform the actual functions of police sergeants, or that the asserted functions were not in fact rationally related to a police sergeant's performance. Plaintiffs could not challenge the motion for summary judgment by relying on allegations contained in their complaint or on affidavits that merely stated conclusory allegations, as did the affidavit of the plaintiffs' counsel. *Fed. R. Civ. P.* 56. The only other affidavit submitted by plaintiffs was one from an individual who asserted that he is qualified in psychology and has expertise in analyzing promotional tests for policemen. We conclude that this affidavit did not raise genuine issue as to a fact material to the alleged consti-

[14] The defendants' rationale from the record was that: the questions challenged by plaintiffs are job-related in that they were validated for determining intellectual ability, logical deduction, common sense, leadership, and decision-making ability, traits desired of sergeants since they are police supervisory personnel; the "criteria used in developing the test represented major or critical work behavior as revealed by careful job analysis. These critical work behavioral elements were developed by research teams, police chiefs, and division commanders. They were applied to existing sergeants and finally to patrolmen taking promotional examinations for the rank of sergeant. These behavioral elements were tested and retested prior to [the December 10, 1977] test."

tutional violation. The affidavit merely raised an issue as to the quality of the professional validation study conducted to evaluate the promotion examination. But as we emphasized in Part III, defendants are not constitutionally required to conduct a professional validation study of the promotion examination. The facts articulated by the defendants directly addressed the sole material issue of constitutional magnitude in this case, namely the rational relation between the contents of the examination and the job performance of police sergeants. Plaintiffs' affidavits clearly do not raise a genuine issue as to this sole material issue.

V

For the foregoing reasons, the judgment of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMENIC DIIULIO, THOMAS J. LAZZARA,
and BERNARD P. NESSEL,

Plaintiffs

No. 78 C 2335 -vs-

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE
CITY OF NORTHLAKE, ILLINOIS, ET AL,

Defendants

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Now comes DONALD O. SHEPHERD, being first duly sworn upon oath, and in opposition to the defendants' motion for summary judgment states as follows:

1. That I am the President of Donald O. Shepherd and Associates, Inc., Management Consultants, 159 North Woodland, Libertyville, Illinois.

2. That I attach as Exhibit A, my resume, which reflects my qualifications in the field of psychology and my expertise in analyzing promotional tests for policemen.

3. That, from 1972 through 1978, I taught courses in statistics, selection and testing at Loyola University on a full time basis.

4. That, recently in the United States District Court located in Chicago, Illinois, I was an expert statistician witness in the Motorola case that involved equal employment opportunity testing issues.

5. That I have personally examined Exhibits A and B attached to Dr. Avrum J. Mendelsohn's affidavit in support of a motion for summary judgment.

6. That, in reviewing the dissertation of Dr. Avrum J. Mendelsohn, marked Exhibit A, I do not find it to be a doctoral thesis in that it has not developed anything new or different in the field of psychology which would constitute advancing general knowledge in the field of psychology as is the purpose of a doctoral thesis.

7. That the alleged doctoral thesis is a simple correlational study which does not demonstrate in any convincing manner that it has uncovered relevant information for first level supervisory police personnel.

8. That the job analysis procedures utilized in Exhibits A and B (dissertation, report) are not spelled out in sufficient detail to comment on their adequacy except to state that, based on the material in the reports, they are not duty/task job analyses.

9. That on page 27 of Exhibit A. it is stated that knowledge of law and report writing ability do not, in the opinion of the police chiefs, relate strongly to successful performance as police supervisors. That the same may be said of the trait of intelligence and performance levels of Ph. Ds. Intelligence is, however, important in functioning as a Ph. D. It may also be true that to function as a supervisor knowledge of law and report writing ability are important and that not all the applicants (police officers) for a position have an adequate level. It is often true that traits which do not successfully predict performance within a job category may well be very important for predicting success in movement from one job category to another (Patrolman to Sergeant).

10. On page 36 of Exhibit A and page 14 of Exhibit B, the term ratio scale is used. However, the term inter-

val scale should be used, since Exhibits A and B are based upon judgments (paired comparison) which relate to interval scale measuring that does not have an absolute zero factor; on the other hand, ratio measuring has an absolute zero factor.

11. That on page 48 of Exhibit A, it states that the supervisors were rated on work qualities, but Exhibit A does not define work qualities. A full discussion and disclosure of the criterion is at least as important as the predictors.

12. That on page 45 of Exhibit A test-retest reliability for an examination is discussed, but is instead reported as a K-R21 reliability coefficient. These two methods of determining reliability (test-retest and K-R21) are totally different in concept and procedure used. In the test-retest method, the same test is administered to the same people on two occasions. In the K-R21 method, the test is administered to *one* group of people *one* time.

13. That on pages 49 and 60-63 of Exhibit A and page 38 of Exhibit B, it is stated that a replicated sampling technique was used in order to determine the consistency and reliability of the stepwise regression equations and cite Yamane (Tukey) as the authority for the procedure. In fact, replicated sampling is used in stratified sampling and *not* as used (however it was used) in the two exhibits. It is used to estimate some characteristics of a population based on a sample—not to check the reliability of a population parameter (population characteristics)—Dr. Mendelsohn is treating the 55 subjects as a population, not as a sample. In fact, one purpose is to make the errors of measurement between samples independent. Exhibits A and B performed the sampling in such a way as to make errors of measurement between samples dependent. In Exhibit A, at least 1/3 of the people in one sample were identical to those in another sample. In Exhibit B, page 47, for the municipal Lieutenants, at least 3/4 of the people in one sample were the same people in another sample. In essence Dr.

Mendelsohn used an inappropriate technique in an incorrect fashion.

14. That in table 9 on page 61-62 of Exhibit A, the 60% sample size of 55 subjects is stated as 37. The 60% sample size should be 33. On page 47 of Exhibit B, the three 80% samples of the 41 "Lieutenants-Municipalities only" are listed as 34, 35 and 34 when, in fact, 80% of 41 is 33 people. On the same page, the three 50% samples of 126 "Sergeants-Municipalities only" are listed as 66, 62 and 63. In fact, 50% of 126 is 63. Why the change in sample sizes?

15. That in Exhibit A, Chapter IV, pages 50-63, it describes how stepwise regression was used to arrive at a multiple correlation of .552 by selecting the best six predictors out of the total of 28 predictors available. To achieve proper results using stepwise regression, one must have a larger number of subjects (considerably more than 55) and a relatively small number of predictors (less than 28) from which one selects the best subset of six predictors.

16. That on page 74 of Exhibit A, job knowledge is viewed as unimportant, but the unimportance is not demonstrated.

17. That on page 11 of Exhibit B for Table 5 on page 32, Dr. Mendelsohn discusses Chi-Square Test, but he fails to describe how the Chi-Square Test was applied and how it was done. Likewise, he does not show all intercorrelations of the variables. For a study of this type, the table of intercorrelations (showing correlations between variables) is essential for any type of evaluation. The lack of such a table is especially serious when it is noted that many types of irrelevant data and tables are included in his exhibits.

18. That Exhibits A and B of Dr. Mendelsohn rely on concurrent validation—administer predictor examination at the same time as criterion scores are collected. The better approach is predictive validation which requires testing before attaining a position and collecting criterion information after the person has been in the

attained position for some time. In Exhibits A and B in the supervisory test, supervisors were tested after they had acquired supervisory experience which would enable them to answer questions in a superior way as distinguished from police officers without such supervisory experience. As incumbents, they can answer more honestly the personalty test questions as they are under no pressure to answer them favorably. Obviously, this type of collected information will influence the manner in which these tests should be scored for applicants.

19. That on page 7 of Exhibit B, the analysis of tasks is not a task analysis.

20. That, on page 58, Table 7, Exhibit A, six predictors are identified as the best. In comparing these six best predictors in Exhibit A with the best predictors in Exhibit B, on pages 48 and 49, (Table 12A) only two of the six predictors are found; namely, COMREY activity and COMREY extroversion. In Table 12B, again, only two of the original predictors are found; namely COMREY activity and temperament comparator stability. In Table 12C, again, only two predictors are found; namely, COMREY activity and COMREY extroversion. In Group D, none of the original six predictors are found. Based upon the six stated predictors in Exhibit A, Exhibit B does not support the findings of Exhibit A.

21. That Exhibit A and Exhibit B grossly overestimate the effectiveness of the selected predictor tests. A cross validation would have adjusted for this; both exhibits lack such validation.

/s/ DONALD O. SHEPHERD

Subscribed and sworn to before me this 16th day of December, 1979.

/s/ MARJORIE M. CARLSTROM
Notary Public